



**ALTERNATIVES TO THE COMMON
FISHERIES POLICY?
THE FUTURE OF THE UK'S FISHERIES
POST-BREXIT
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Abstract

The Common Fisheries Policy (CFP) of the European Union has faced problems relating to sustainability since its conception. Subsequent reforms have offered some limited means of mitigating these problems yet ultimately they have not been adequately addressed and continue to cause critical damage to the European fisheries. Sound scientific advice has been continuously ignored resulting in catches in excess of the Total Allowable Catch (TAC), further compounding depleted stocks and reducing the chances of recovery. Despite the latest reform in 2013, European fisheries remain in a perilous condition. Brexit creates an opportunity for the UK to develop its own fisheries legal framework. A tailor-made system of management specific to the UK waters is an enticing prospect for the UK fishing industry. However, the CFP will remain in operation for the remaining Member States after the UK has left the Union, therefore the UK is likely to encounter substantial difficulty in developing its own personalised fisheries management system, such is the entrenched nature of the CFP and other relevant international law.

Keywords: Common Fisheries Policy, Brexit, fishery management

Introduction

The Treaty on the Functioning of the European Union (TFEU) Article 38(1) provides for the implementation of a fisheries policy. The CFP's aim is to secure the 'sustainability of fish stocks and the economic competitiveness of the fishing industry.'² EU fisheries 'mainly lie in the Atlantic and Arctic Oceans, the Baltic, the North Sea, the

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² Khalilian, S., et al., 'Designed for failure: A critique of the Common Fisheries Policy of the European Union', (2010) 34(6) *Marine Policy* 1178-1182 at 1178.

Mediterranean and the Black Sea'.³ Both capture fisheries and aquaculture are subject to the CFP. Reformation occurs approximately every ten years when the Commission issues a green paper setting out material to be considered for reform. The current version of the CFP is in the 2013 Fisheries Regulation.⁴

A remarkable trait is the 'lack of political will to reform the CFP and ensure structural readjustment of the EU fishing sector.'⁵ Fisheries contribute 'little to the gross domestic product of many Member States. They are not high on the political agenda and this has been reflected in their treatment.'⁶ Unfortunately, money talks and lucrative policy areas take precedent over other matters that generate less revenue, regardless of their own unique importance. Repeated failures have resulted in 'depleted fish populations and billions of euros in lost economic potential.'⁷ Brexit is an opportunity for the UK to start afresh, but difficulties will be encountered because the CFP will continue to govern the majority of Europe's fisheries.

1 Origins of the Common Fisheries Policy

The CFP started with the 1970 Fisheries Regulation⁸ (superseded by the 1976 Fisheries Regulation⁹) drafted 'in response to the requirements of the Treaty of Rome focussing on "equal access."¹⁰ The basic principle of Article 1 was 'equal conditions of access for all Community fishermen to each Member State's territorial sea and exclusive fishing zone.'¹¹ This condition was met with suspicion from the nations that were in negotiations to enter the EEC during that time (Denmark, Ireland, Norway and the UK). The fishing interests of these nations were greater than those of the original six Member States (Belgium, France, Germany, Italy, Luxembourg and the

³ Wakefield, J., *Reforming the Common Fisheries Policy* (2016) at 51.

⁴ Council Regulation (EU) No 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, [2013] OJ L354/22

⁵ Raakjaer, J., *A Fisheries Management System in Crisis: The EU Common Fisheries Policy* (2009) 61.

⁶ Wakefield, J., 'Sustainability and socio-economic need in the common fisheries policy', (2010) 35(4) *European Law Review* 476-496 at 481.

⁷ Carpenter, G., et al., 'Landing the blame: The influence of EU Member States on quota setting', (2016) 64 *Marine Policy* 9-15 at 9.

⁸ Regulation (EEC) No 2141/70 of the Council, laying down a common structural policy for the fishing industry, [1970] OJ L236/1.

⁹ Council Regulation (EEC) No 101/76, laying down a common structural policy for the fishing industry, [1976] OJ L20/19.

¹⁰ Raakjaer, *Fisheries Management System in Crisis*, 51.

¹¹ Churchill, R., 'The EEC fisheries policy: Towards a revision', (1977) 1(1) *Marine Policy* 26-36 at 26.

Netherlands). Collectively, the four nations seeking membership 'caught over three times as much fish and would have turned the EEC from a net importer of fish to a net exporter', they had a greater contingent of inshore fishermen who 'formed the backbone of the local economy [... and] far greater fish-stocks in their coastal waters and had practised more effective conservation policies.'¹² Arguably, by virtue of the equal access requirement, the original six members of the EEC were to secure the more advantageous position. Negotiations were tense and 'the failure to secure better terms was one of the main reasons why the majority of Norwegians voted against EEC membership in their referendum.'¹³ The 1972 Accession Treaty contained a derogation to the equal access principle permitting Member States to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of six nautical miles, calculated from the base lines of the coastal Member State, to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area.¹⁴

Theoretically, the transition period afforded isolated communities dependant on fishing time to acclimatise to the impending changes mitigating any adverse impacts the new regime might have on local fishing communities. Denmark, Ireland and the UK took full advantage¹⁵ of the derogation.

The 1976 Fisheries Regulation established four main policy objectives: economic rationality, food security, social objectives and conservation. These objectives are contradictory and the ineffectiveness of the CFP can largely be attributed to this incoherency, 'an obvious mechanism for managing such disparate and conflicting objectives would have been to impose strong central control.'¹⁶ Instead, the EU controls fishing policy and Member States are responsible for the sector's industrial strategy with each Member State pursuing 'different, and even contradictory, objectives.'¹⁷ European environmental policy was primarily focused on pollution and non-renewable resources¹⁸ therefore the possibility of overexploiting the seas was

¹² Ibid.27.

¹³ Ibid.

¹⁴ Treaty of Accession of Denmark, Ireland and the United Kingdom Article 100 [1972] OJ L73/15

¹⁵ Churchill, 'The EEC fisheries policy, 27.

¹⁶ Wakefield, *Reforming the Common Fisheries Policy*, 3.

¹⁷ Ibid.

¹⁸ Declaration of the Council of the European Communities and of the representatives of Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment [1973] OJ C112/01

overlooked.¹⁹

The First Revision of the Common Fisheries Policy

In 1983 the CFP became a full fisheries policy when

agreement was reached on a conservation component and a TAC [Total Allowable Catch] system was adopted for most stocks, allocating the same percentages of the TAC to Member States every year – known as "relative stability."²⁰

It provided that 'the Council, acting on a proposal from the Commission, shall examine the provisions which could follow the derogations in force until 31 December 1982.'²¹ The derogation allowed for the restriction of fishing up to 6 nautical miles from the baseline of the coastal Member State 'to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area.'²² Attempts to revise the initial CFP were initiated before the derogations under Article 100 of the Accession Treaty expired. Preferential rights for local fishermen and measures necessary to guarantee a fair standard of living for those dependant on fisheries were recommended by the Danish Government.²³ The Council decided to postpone making a decision until after the United Nations Conference on the Law of the Sea which established a 'comprehensive set of international law rules dealing with marine fisheries.'²⁴

Initial reaction to the 1983 CFP was mainly one of relief that an agreement had been reached.²⁵ This agreement followed the signing of the 1982 United Nations Convention on the Law of the Sea (CLOS) and the principles of fishing in the EEZ 'were to form the basis of EU fisheries regulation'.²⁶ After ratification by the EU, the EEZ concept became binding²⁷ in EU waters and the Member States' fishing limits were extended to 200 nautical miles from their respective coasts. Under the traditional

¹⁹ Wakefield, *Reforming the Common Fisheries Policy*, 55.

²⁰ Raakjaer, *A Fisheries Management System in Crisis*, 51.

²¹ Treaty Accession of Denmark, Ireland and the United Kingdom Article 103 [1972] OJ L73/15.

²² *Ibid.*

²³ Churchill, 'The EEC fisheries policy', 27.

²⁴ Tsamenyi, M., and Hanich, Q., 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States', (2012) 27(4) *International Journal of Marine and Coastal Law* 793-793 at 793.

²⁵ Churchill, R., 'EEC fisheries: agreement at last', (1983) 7(2) *Marine Policy*, 74.

²⁶ Wakefield, J., 'The problem of regulation in EU fisheries', 15(3) *Environmental Law Review* 191-204 at 192-193.

²⁷ Wakefield, *Reforming the Common Fisheries Policy*, 55.

rules of international law, the sea was divided into the high seas and the territorial seas each with different regulations. Coastal states have an unquestioned right to regulate fisheries exploitation in the territorial sea and to 'apply domestic legislation fully to any person engaged in such activities. Similarly, the coastal state was free to prohibit fishing by foreigners in its territorial sea and thus to monopolize those fishery resources.'²⁸

The EEZ concept is covered in Part V of the 1982 Convention, 'largely framed in terms of rights and responsibilities and the duty to cooperate.'²⁹ Article 55 provides that 'the exclusive economic zone is an area beyond and adjacent to the territorial sea [which is the zone extended to 12 nautical miles from the coast of the Member State]'. The coastal State has 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living.'³⁰ Coastal states are to have 'due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.'³¹

Both Articles 63 and 64 contain measures enabling the management of the oceans' living resources in a way that is compatible with the ocean itself. The policies adopted by one State within its EEZ are highly likely to affect the marine environment on a broad scale, therefore cooperation is paramount. Where stocks of species are present in the EEZ of two or more coastal States, emphasis is placed on voluntary agreement to 'ensure the conservation and development of such stocks.'³² This obligation is extended to include areas that are 'beyond and adjacent to the zone.'³³ Where highly migratory species (listed under Annex.1 of UNCLOS) are concerned, States whose nationals fish in a region where such species are located 'shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the [EEZ].'³⁴ States are to 'cooperate to establish such

²⁸ Oda, S., 'Fisheries under the United Nations Convention on the Law of the Sea', (1983) 77(4) *The American Journal of International Law* 739-755 at 739.

²⁹ Tsamenyi, 'Fisheries Jurisdiction under the Law of the Sea', 784.

³⁰ *United Nations Convention on the Law of the Sea* 1982 Part V – Exclusive Economic Zone Article 56(1)(a).

³¹ Article 56(2).

³² Article 63(1).

³³ Article 63(2).

³⁴ Article 64(1).

an organization and participate in its work³⁵ if none exist.

UNCLOS is a monument to 'international law-making'³⁶ establishing international rules to encourage cooperation between States.³⁷ It has been described as 'the constitution for the oceans.'³⁸ However, the Convention has not been without issue; persistent non-compliance has been a matter of 'serious concern.'³⁹ Fish-stocks are continuously over-exploited which is evidence of breaches of obligations under Article 61(2) and Articles 117-119 (providing the obligation to conserve living resource of the high seas) and Article 194(5) (failure to take necessary measures to protect and preserve rare/fragile ecosystems).⁴⁰ Evidently then, it is not only the CFP that has struggled to deal with the prominent global marine environment issues.

The Fully Established Common Fisheries Policy

The 1983 CFP⁴¹ was based on a TAC system for each fish-stock to be set by the Council of Ministers (composed of the Fisheries Minister of the 27 Member States⁴²) after consideration of the Commission's legislative proposals.⁴³ Theoretically, the TAC is to be set according to recommendations made by biologists from the International Council for the Exploration of the Sea (ICES).⁴⁴ Under the 1983 Fisheries Regulation, the TAC of each fish-stock is 'distributed between the Member States in a manner which ensures each Member State relative stability of fishing activities for each of the stocks considered.'⁴⁵ Relative stability entailed that 'national quotas for each stock would be allocated between Member States in the same proportion as their catches of that stock over a certain past reference period.'⁴⁶

³⁵ Article 64(1).

³⁶ Papanicolopulu, I., 'The Law of the Sea Convention: No Place for Persons?' (2012) 27(4) *International Journal of Marine and Coastal Law* 867-874 at 867.

³⁷ Wakefield, *Reforming the Common Fisheries Policy*, 29.

³⁸ Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' 867.

³⁹ Churchill, R., 'The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans', (2012) 27(4) *International Journal of Marine and Coastal Law* 813-820 at 820

⁴⁰ *Ibid* 815.

⁴¹ Council Regulation (EEC) No170/83 establishing a Community system for the conservation and management of fishery resources, [1983] OJ L24/1

⁴² Raakjaer, *A Fisheries Management System in Crisis*, 52.

⁴³ Dadge, C., 'A critical evaluation of the Common Fisheries Policy and reform proposals', (2012) 24(2) *Environmental Law and Management* 60-74 at 61.

⁴⁴ Cunningham, S., 'EEC fisheries management: A critique of Common Fisheries Policy Objectives', (1980) 4(3) *Marine Policy* 229-235 at p.231

⁴⁵ 1983 Fisheries Regulation Article 4(1).

⁴⁶ Churchill, 'The EEC fisheries policy: Towards a revision', 29.

Alongside the principle of relative stability, the TAC method of setting catch quotas is the 'cornerstone in the conservation policy and EU fisheries management.'⁴⁷ When this conservation policy was established, overfishing was 'considered relatively unimportant.'⁴⁸ Initially, it was thought that this system would provide an effective method of fisheries management but was recognised as dependant on the TAC of any given fish-stock being 'set at the level recommended by fishery scientists and not boosted to increase State's quotas.'⁴⁹ These reservations turned out to be well-founded, between 1984 and 1992, 'there was good compliance with scientific advice only when proposed changes to TACs were small.'⁵⁰

Irreconcilable tension between conserving fish-stocks and the 'promotion of fishing activity to protect jobs has helped maintain overcapacity and excessive extraction rates.'⁵¹ Conservation was not a priority for Member States when the 1983 Regulation was introduced, they were 'more interested in dividing up fishing entitlements.'⁵² The 'significant gap between the levels of TACs agreed in Council and sustainable catches indicates the prevalence of short-term concerns over long-term sustainability.'⁵³ Perhaps the most reasonable explanation as to why the Council adopts a socio-economic discourse to justify increasing TACs is that fisheries ministers are 'under pressure from domestic fishing sector representatives, who obviously have a short-term interest in protecting the profitability of their business.'⁵⁴ Fisheries ministers often share common interests with the fishermen and therefore argue that 'fish should not come before people'.⁵⁵ As the domestic fishing industry has a vested interest in TACs being set as high as possible, it would be particularly difficult for ministers to persuade fishermen to adopt a long-term view. Historically, fishermen have harboured scepticism about scientific assessments,⁵⁶ questioning the advice of expert bodies and demonstrating a reluctance to adapt when jobs are at risk. Arguably, the root

⁴⁷ Raakjaer, *A Fisheries Management System in Crisis*, 53.

⁴⁸ Penas, E., 'The fishery conservation policy of the European Union after 2002: towards long-term sustainability', (2007) 64(4) *ICES Journal of Marine Science* 588-595 at 588.

⁴⁹ Churchill, 'EEC fisheries: agreement at last', 74.

⁵⁰ Carpenter, 'Landing the blame', 10.

⁵¹ Wakefield, *Reforming the Common Fisheries Policy*, 4.

⁵² *Ibid* 55.

⁵³ Da Rocha, J., et al., 'The Common Fisheries Policy: An enforcement problem', (2012) 36(6) *Marine Policy* 1309-1314 at 1313.

⁵⁴ Raakjaer, *A Fisheries Management System in Crisis*, 78.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* 79.

cause of this problem is the irrationality of the main objectives of the CFP; by prioritising one objective others will be marginalised. The process leads to the 'paradox of ministers protecting national interests while attempting to allocate quotas among Member States for mutual benefit and to achieve conservation goals.'⁵⁷

The TAC system has been hindered because, until the 2013 Fisheries Regulation,⁵⁸ catch statistics did not include the 'volume of discards and illegal, unreported and unregulated catches.'⁵⁹ Consequently, it appeared from the fish that were landed that fewer fish were being taken; fish that were caught accidentally or caught in excess of the vessel's quota were simply thrown back dead overboard.

The Tragedy of the Commons

The 'tragedy of the commons'⁶⁰ has long been recognised as a problem affecting fisheries:⁶¹ in an open pasture, each herdsman seeks to maximise his gain, only considering the utility of adding another animal to his herd. This utility is comprised of both a positive and a negative element: 'Since the herdsman receives all the proceeds from the sale of the additional animal, his positive utility is nearly +1.' However, since 'the effects of overgrazing are shared by all herdsmen the negative utility for any particular decision-making herdsman is only a fraction of -1.' The rational herdsman concludes that the sensible course of action is to continue adding animals to his herd. All herdsman reach the same conclusion, giving rise to the tragedy '...Freedom in a commons brings ruin to all.'⁶²

The TAC system exacerbates the situation encouraging fishermen to race to catch fish; where species are profitable economically, 'catches usually exceed the quota allocated.'⁶³ National governments 'refrain from enforcing strict control on their citizens because of the perception that none of the other Member States do.'⁶⁴ Due to the

⁵⁷ O'Leary, B.C., et al., 'Fisheries Mismanagement', (2011) 62(12) *Marine Pollution Bulletin* 2642-2648 at 2642.

⁵⁸ Regulation (EU) No 1380/2013.

⁵⁹ Villasante, S., et al., 'Overfishing and the Common Fisheries Policy: (un)successful results from the TAC regulation?' (2011) 12(1) *Fish and Fisheries* 34-50 at 36.

⁶⁰ Hardin, G., 'The Tragedy of the Commons', (1968) 162(3859) *Science* 1243-1248.

⁶¹ Van Long, N., and McWhinnie, S., 'The tragedy of the commons in a fishery when relative performance matters', (2012) 81 *Ecological Economics* 140-154 at 140.

⁶² Hardin, G., 'The Tragedy of the Commons', (1968) 162(3859) *Science* 1243-1248 at 1244.

⁶³ Villasante, 'Overfishing and the Common Fisheries Policy', 36.

⁶⁴ Raakjaer, *A Fisheries Management System in Crisis*, 54.

actions of the more militant fishermen, the community at large will ultimately suffer; in 2007⁶⁵ France and Italy had both overfished their bluefin tuna quotas, resulting in the EU's share being exhausted⁶⁶ and the affected fisheries were closed.⁶⁷ After the ban was lifted in 2008, the Member States who had been denied the opportunity to fulfil their quota were granted compensation in the form of additional share of the TAC deducted from the quota of France and Italy. Even though the Member States (Cyprus, Greece, Malta, Portugal and Spain) were compensated, this incident demonstrates that the tragedy of the commons is inherent and that the damage caused by the transgressors is dispersed across all sharing the resource.⁶⁸ Compensation does not remedy the situation because it quantifies the damage done in terms of loss of revenue for the Member States' fishing industries, whereas the damage done to the fish-stock cannot be redressed through compensation. Instead, prohibitive measures are required, which in turn cause further loss of revenue for the EU's fishing industry as a whole.

2 The Factortame Saga: TACs and National Quotas Subverted?

The 1983 CFP granted one exception to the equal access principle in the form of the exclusive national coastal zone. The Commission proposed that this should be a zone consisting of 12 miles from the baseline of the coastal State's territorial sea.⁶⁹ However, the agreement preserved zones of 6 or 12 miles; this was viewed as a 'necessary measure of protection and preference for local inshore fishermen.'⁷⁰ Although mostly superseded by the CFP, the exclusive national zone was derived from the 1964 Fisheries Convention (Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the UK are signatories). Under this Convention, the coastal State has 'the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles from the baseline of its

⁶⁵ Council Regulation (EC) No1533/2007 amending Regulations (EC) No 2015/2006 and (EC) No 41/207, as regards fishing opportunities and associated conditions for certain fish stocks, [2007] OJ L337.

⁶⁶ Wakefield, *Reforming the Common Fisheries Policy*, 167.

⁶⁷ Commission Regulation (EC) No 1073/2007 establishing a prohibition of fishing for bluefin tuna by Community vessels in the Atlantic Ocean, east of longitude 45°W, and the Mediterranean Sea, [2007] OJ L245/3

⁶⁸ Fahy, E., *Overkill! - the euphoric rush to industrialise Ireland's sea fisheries and its unravelling sequel* (2013) 198.

⁶⁹ Churchill, 'The EEC fisheries policy: Towards a revision', 29.

⁷⁰ Churchill, 'EEC fisheries: agreement at last', 74.

territorial sea.⁷¹ The Convention also provides that 'within the belt between 6 and 12 miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal State and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1 January 1953 and 31 December 1962.' These measures were retained in the CFP as exceptions to the equal access principle,⁷² yet this does not apply to the EEZ, which is accessible to the other Member States.

The *Factortame* saga's central issue was that 'the British government, concerned that many vessels registered under the Merchant Shipping Act 1894 were only nominally British, decided to take steps to protect the British fishing quota.'⁷³ The Act (which has since been repealed) was passed, mainly to prevent 'quota-hopping' by (mainly Spanish) vessels registered in Britain as a means of accessing the British proportion of the TAC.⁷⁴ Quota-hopping occurs where 'vessels beneficially owned by the Nationals of one Member State are re-registered under the flag of another Member State and fish for the quotas allocated to the latter Member State.'⁷⁵ This practice has 'gradually weakened the British fishing industry.'⁷⁶ Under s.14, a fishing vessel must be British-owned, managed within the UK and any charterer, manager or operator of the vessel must be a British citizen domiciled in the UK or must be a company of which 75% of its shares are owned by British citizens (s.14(7)). Ultimately, the provisions in question were deemed incompatible with Community law by the ECJ. In reaching its decision, the ECJ observed that Community law grants the Member States 'competence to determine the conditions for the registration of vessels.'⁷⁷ Member States must act consistently with Community law.⁷⁸ The ECJ ruled⁷⁹ that the conditions attached to fishing vessel registration under s.14(7) were contrary to

⁷¹ 1964 *London Fisheries Convention* Article 2

⁷² Gwiazda, A., 'The Common Fisheries Policy: Economic Aspects', (1993) 17(4) *Marine Policy* 251-255 at 252.

⁷³ Hanna, J., 'Case comment Community rights all at sea', (1990) 106 *Law Quarterly Review* 2-8 at 2.

⁷⁴ Magliveras, K.D., 'Fishing in troubled waters: the Merchant Shipping Act 1988 and the European Community', (1990) 39(4) *International & Comparative Law Quarterly* 899-914 at 906.

⁷⁵ Churchill, R., 'Fisheries: can quota-hopping be stopped?', (1989) 14(6) *European Law Review* 470-474 at 470.

⁷⁶ Noifalisse, C., 'The Community System of Fisheries Management and the *Factortame* Case', (1992) 12(1) *Yearbook of European Law* 325-351 at 325.

⁷⁷ Case C-211/89 *R v The Secretary of State for Transport, ex parte Factortame Limited and Others* [1991] E.C.J at p.3962 para.13.

⁷⁸ p.3963 para.14.

⁷⁹ pp.3970-3971 para.2.

Community law and, in particular, contrary to Article 52 of the Treaty of Rome (abolishing restrictions on the freedom of establishment of nationals of a Member State in another Member State).

When the British government attempted to protect the interests of fishing communities with the Merchant Shipping Act 1988, it was prevented from doing so on the grounds that such a measure was incompatible with Community law. It is demonstrable from the *Factortame* decision that 'a core element of the CFP does not sit easily within the general framework of Community law.'⁸⁰ Relative stability 'was explicitly justified by reference to the socio-economic importance of fishing to coastal communities.' Distribution of the TAC through national quotas indicates an intention to 'benefit the economy of the Member State to which they were allocated, rather than the economies of other Member States.'⁸¹ Arguably, *Factortame* undermined the TAC and relative stability as Spanish vessels were able to exploit a loophole to the detriment of the British fishing industry.

Similarly, when in 2003 a new Regulation⁸² first brought the Azores within the full ambit of the CFP,⁸³ a case was brought against the Council by the Azores⁸⁴ wherein an application for the partial suspension of the Regulation in order to prevent any adverse impact on Azorean waters was denied. Counsel for the Azores submitted that the contested Regulation would result in fish-stocks being irreversibly depleted causing the 'total collapse of the Azorean fishing industry.'⁸⁵ The Council ruled that the applicant had not substantiated this claim to the requisite legal standard.⁸⁶ A partial suspension of the Contested Regulation was deemed by the Council to be disproportionate in the circumstances and would have encroached on the CFP and third parties (largely Spanish fishermen) who also fished in the area governed by the

⁸⁰ Hatcher, A., et al., "'Quota-hopping" and the foreign ownership of UK fishing vessels', (2002) 26(1) *Marine Policy* 1-11 at 2.

⁸¹ *Ibid.*

⁸² Council Regulation (EC) No 1954/2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95, [2003] OJ L289/1

⁸³ Wakefield, J., 'The plight of the regions in a multi-layered Europe', (2005) 30(3) *European Law Review* 406-419 at 411.

⁸⁴ Case T-37/04 R *The Autonomous Region of the Azores v Council* (Order of the President, 7 July 2004) [2004] E.C.R. II-2153.

⁸⁵ *Ibid* at p.2219 para.18.

⁸⁶ p.2220 para.190.

Contested Regulation.⁸⁷ A reversion to the previous fisheries regime⁸⁸ protected Azorean waters indirectly through rules limiting the access to foreign vessels. Under the Accession Treaty⁸⁹ for Spain and Portugal, certain derogations were permitted to facilitate transitional access regime (as they were in the UK Accession Treaty⁹⁰). However, the regime was scheduled to end on 31 December 2002 and it was observed that the provisions restricting access of foreign vessels could not remain in force⁹¹ because discrimination on the grounds of nationality was prohibited under Article 12 of the Treaty Establishing the European Community. In dismissing the application, the Council opened 'one of the last artisanal fishing areas within the Community to industrial exploitation.'⁹² The *Factortame* and *Azores* cases illustrate that the CFP has failed to protect communities dependant on fishing. Because measures designed to offer such protection are almost certain to be discriminatory in some way, there has been great difficulty in attempting to reconcile them with EU law in a wider sense.

The Common Fisheries Policy 1992-2002

When the 1992 reform materialised, 'fleet capacity, and overfishing had become pressing issues, but reform measures introduced proved ineffective in matching fishing effort to available resource.'⁹³ The Commission stated that it was necessary to reduce fishing capacity and to minimise socio-economic upheaval with measures sympathetic to the geographical concentration of fishing and related activities.⁹⁴ The Report also identified two reasons as to why discards were so prevalent: there is either a legal obligation to do so (for example if the catch exceeds the quota) or it is economically viable to do so, discards could be eliminated if selective fishing techniques were made available.⁹⁵ The main management tool used throughout the 1990s 'continued to be annual single species TACs, which continued frequently to be set at levels above those recommended by fisheries scientists.'⁹⁶ Evidence of lethargy in the reformation

⁸⁷ p.2221 para.193.

⁸⁸ Council Regulation (EC) No 685/95 on the management of the fishing effort relating to certain Community fishing areas and resources, [1995] OJ L71/5.

⁸⁹ Treaty of Accession of the Kingdom of Spain and the Portuguese Republic [1985] OJ L302/28.

⁹⁰ Treaty Accession of Denmark, Ireland and the United Kingdom Article 100 [1972] OJ L73/15.

⁹¹ *The Autonomous Region of the Azores v Council* p.2202 para.132.

⁹² Wakefield, *Reforming the Common Fisheries Policy*, 118.

⁹³ *Ibid* 56.

⁹⁴ *Report 1991 from the Commission to the Council and the European Parliament on the Common Fisheries Policy*, SEC(91) 2288, 18.12.1998 Executive Summary at iv.

⁹⁵ *Ibid* 20.

⁹⁶ Churchill, R., and Owen, D., *The EC Common Fisheries Policy* (2010) at 15.

process and the lack of 'political will'⁹⁷ is apparent in the 1992 Fisheries Regulation; which had a minimal impact on the core structure and functions of the CFP.

The Common Fisheries Policy 2002-2013

A Green Paper⁹⁸ was published prior to the 2002 Fisheries Regulation,⁹⁹ at a time of crisis for the fishing industry with decisive action required to ensure its survival.¹⁰⁰ At last it appeared that the gravity of the situation was understood, the Commission conceded that many fish-stocks would collapse should current trends continue.¹⁰¹ Member States' failure to sufficiently enforce measures was 'persistent and possibly deliberate.'¹⁰² In 1991,¹⁰³ France was found to have failed to comply with conservation measures, in 2005¹⁰⁴, France had again failed to take action in respect of infringements and had not implemented measures required under the 1991 ruling.

The tendency of the Council to set TACs beyond scientific recommendations was identified as a consequence of 'management deficiencies.'¹⁰⁵ The Commission also reported a shortage of competent fisheries scientists who were often too restrained by the process of giving advice on TACs and quotas 'to allow time for innovative thought'. The Commission observed that the fleet was too large and the criteria used to determine fishing capacity (tonnage and engine power) was redundant because technological advances meant that 'new vessels exert much more fishing effort than old vessels of equivalent tonnage and power.' Capacity reduction programmes were undermined¹⁰⁶ because the fishing industry had 'been able to circumvent the restraints on fishing activity laid down in regulation through an excessive use of new technology.'¹⁰⁷ To counteract over-capacity, Regulations¹⁰⁸ were created to

⁹⁷ Raakjaer, *A Fisheries Management System in Crisis*, 61.

⁹⁸ European Commission, *Green Paper on the Future of the Common Fisheries Policy*, COM (2001) 0135 final.

⁹⁹ Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, [2002] OJ L358/59.

¹⁰⁰ 'CFP: time for a rethink', (2001) 74 *EU Focus* 16-18 at 16.

¹⁰¹ European Commission, *Green Paper on the Future of the Common Fisheries Policy*, 4.

¹⁰² Harlow, C., and Rawlings, R., 'Accountability and law enforcement: the centralised EU infringement procedure', (2006) 31(4) *European Law Review* 447-475 at 463.

¹⁰³ Case C-64/88 *Commission v France* [1991] E.C.R. I-2727 at p.2754 para.23.

¹⁰⁴ Case C-304/02 *Commission v France* [2005] E.C.R. I-6263 at p.6356 para.1.

¹⁰⁵ European Commission, *Green Paper on the Future of the Common Fisheries Policy*, 8.

¹⁰⁶ *Ibid* 10.

¹⁰⁷ Wakefield, *Reforming the Common Fisheries Policy*, 57.

¹⁰⁸ Council Regulation (EC) No 2370/02 establishing an emergency Community measure for scrapping fishing vessels, [2002] OJ L358.

decommission fishing vessels and¹⁰⁹ restrict public aid to the fisheries sector. The days at sea regulation¹¹⁰ (established to aid cod recovery in the Atlantic) was the first control used as a management instrument. It was discovered that reducing fishing days does not necessarily reduce fish mortality 'because fishers are free to use the available fishing days as they find most profitable.' Because reductions in some areas have been compensated by increases in others, 'the days at sea limits implemented so far have failed to control overall effort.'¹¹¹

Increased focus on multi-annual plans guided by the precautionary principle were recommended as a means of avoiding 'the postponement of difficult decisions for the future and abrupt changes in the volume of TACs from one year to the other.'¹¹² The 2002 Regulation distinguished between recovery plans¹¹³ for stocks outside safe biological limits and management plans¹¹⁴ for stocks within safe biological limits, both of which imposed an obligation to adopt long-term strategies.¹¹⁵ The 2002 CFP¹¹⁶ incorporated the same balancing of aims that has 'always proved problematic';¹¹⁷ allocating equal importance to sustainability, social aspects and environmental protection 'could not be effective.'¹¹⁸ Despite the attempt to elevate the prominence of sustainability, TACs adopted in the 2003-2007 period were, on average, set 42-57% higher than the recommended level.¹¹⁹ Findings showed that multi-annual plans to radically reduce fishing activities would be met with 'fierce opposition, no matter how strong the scientific evidence.'¹²⁰ Scientific advice was not binding and the Council had discretion where priority of interests was concerned.¹²¹ Data shows that, on average, EU TACs were set 20% above the recommended level between 2001 and

¹⁰⁹ Council Regulation (EC) No 2369/02 amending Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, [2002] OJ L358

¹¹⁰ Council Regulation (EC) No 2341/2002 fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, [2002] Annex XVII OJ L356/12.

¹¹¹ Penas, 'The fishery conservation policy of the European Union after 2002', 591.

¹¹² European Commission, *Green Paper on the Future of the Common Fisheries Policy*, 22.

¹¹³ 2002 Fisheries Regulation Article 5.

¹¹⁴ Article 6.

¹¹⁵ Article 5(3) and Article 6(3).

¹¹⁶ Article 2.

¹¹⁷ Howarth, W., 'The Interpretation of 'Precaution' in the European Community Common Fisheries Policy', (2008) 20(2) *Journal of Environmental Law* 213-244 at.236.

¹¹⁸ Wakefield, *Reforming the Common Fisheries Policy*, 59.

¹¹⁹ Raakjaer, *Fisheries Management System in Crisis*, 62.

¹²⁰ Penas, 'The fishery conservation policy of the European Union after 2002', 591.

¹²¹ Wakefield, 'The problem of regulation in EU fisheries', 194.

2015.¹²² Proposals for the 2002 reform were more extensive than those of 1992 but 'the outcome of the reform process fell far short of what was proposed.'¹²³ Methods to harmonise the CFP's objectives have persistently eluded the Commission and, exasperatingly, its best efforts have been brushed aside by an industry that is entirely set in its ways. Unsustainable practices were not reduced and habits entrenched in the fishing industry's collective mindset found ways to seep through the CFP's reformed framework.

The Common Fisheries Policy 2013

Through the 2013 reform of the CFP, the Commission intended to 'instil a greater sense of responsibility for the resource in appropriators.'¹²⁴ Quite remarkably, the CFP had not yet addressed this issue. The Commission's 2009 Report concluded with 'masterful understatement'¹²⁵ that the objectives agreed to achieve sustainable fisheries have not been met overall. Five structural problems were identified: fleet overcapacity (too many vessels, not enough fish, imprecise policy objectives, a decision-making process that encourages a short-term focus, a framework that does not give the industry sufficient responsibility and a lack of political will to ensure compliance/poor compliance by the industry. Though the situation looked bleak, the Commission maintained that, with whole-scale reform, it could be remedied. Objectives include long-term sustainability, application of the precautionary approach, implementation of an eco-system based method to fisheries management and contribution to the collection of scientific data.¹²⁶ TACs remain as the CFP's core management instrument¹²⁷ for the purposes of exploiting marine biological resources at the maximum sustainable yield¹²⁸ (MSY). MSY is defined as the 'highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process.'¹²⁹

¹²² Carpenter, 'Landing the blame', 12.

¹²³ Raakjaer, *A Fisheries Management System in Crisis*, 62.

¹²⁴ Wakefield, 'The problem of regulation in EU fisheries', 191.

¹²⁵ *Ibid* 63.

¹²⁶ 2013 Fisheries Regulation Article 2(4)

¹²⁷ Salomon, M., et al., 'Masterstroke or paper tiger: the reform of the EU's Common Fisheries Policy', (2014) 47 *Marine Policy* 76-84 at 77.

¹²⁸ 2013 Fisheries Regulation Article 2(2).

¹²⁹ Article 4(7).

The Commission found that relative stability had given rise to 'a considerable discrepancy between the quotas allocated to Member States and the actual needs and uses of their fleets.'¹³⁰ The Commission proposed that relative stability could be replaced with the allocation of fishing rights. It is alleged that individual transferable quotas (ITQs) will harness fishermen's self-interest 'by effectively rewarding more efficient use of resources through the market.'¹³¹ There is a risk that small-scale fisheries could be 'easily crowded out of the market.'¹³² The Commission did suggest a separate system for small-scale coastal fleets but this did not materialise.¹³³ It is also provided that 'no exit from the fleet supported by public aid shall be permitted unless preceded by the withdrawal of the fishing licence and the fishing authorisations.'¹³⁴ Fishing capacity that corresponds to vessels withdrawn with public aid shall not be replaced and the EU's fisheries funding instrument provides that financial contribution in pursuit of objectives 'shall not result in an increase in fishing capacity.'¹³⁵ The tightening of subsidies under the European Maritime and Fisheries Fund (EMFF) justifies 'cautious optimism' and the ability to 'establish national systems of transferable fishing concessions has the potential to increase efficiency in the fisheries sector.'¹³⁶

Due to a top-down approach, the fishing industry has been given few incentives to behave responsibly.¹³⁷ Therefore Member States having a direct interest in certain measures may submit recommendations for achieving such objectives. The Commission is obliged to delay delegation/implementation until the 'expiry of the deadline for submission of joint recommendations by the Member States.'¹³⁸ Regional measures have been introduced in order to achieve 'better implementation by more coordinated actions at a regional level.'¹³⁹ Arguably, the regionalisation provision

¹³⁰ European Commission, *Green Paper: Reform of the Common Fisheries Policy*, COM (2009) 163 final at 16.

¹³¹ *Ibid.* 164.

¹³² Markus, T., and Salomon, M., 'The Law and Policy Behind the Upcoming Reform of the Common Fisheries Policy', (2012) 9.3(4) *Journal for European Environmental & Planning Law* 257-284 at 276

¹³³ Wakefield, 'The problem of regulation in EU fisheries' 198.

¹³⁴ 2013 Fisheries Regulation Article 22(5)

¹³⁵ Regulation(EU) No 508/2014 of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, [2014] OJ L149/1.

¹³⁶ Salomon, 'Masterstroke or paper tiger', 83.

¹³⁷ European Commission, *Green Paper: Reform of the Common Fisheries Policy*, COM (2009) 11.

¹³⁸ 2013 Fisheries Regulation Article 18(1).

¹³⁹ Maia, N., and Markus, T., 'Dividing the common pond: Regionalising EU ocean governance', (2013)

relieves the central level and provides it with 'the opportunity to escape, at least in part, the micro-management trap and focus more on principles.'¹⁴⁰ Despite being criticised as 'weak'¹⁴¹ Article 28 can be regarded as 'a starting point for increased regional governance of fisheries activities within the overall CFP architecture.'¹⁴²

The 'major achievement'¹⁴³ of the 2013 Regulation is the ban on discards. In severe cases, discards have represented over 60% of the catch.¹⁴⁴ The landing obligation¹⁴⁵ is the instrument adopted to facilitate the discard ban. Generally, the ban has been hailed as constituting a vast improvement to the CFP,¹⁴⁶ but it is not without irregularities that could potentially undermine the policy. For example, the discard ban only applies to commercially important species but, in order to provide greater protection for biodiversity, 'it would be preferable that all fish and targeted species are covered.'¹⁴⁷

Remote electronic monitoring (REM) systems are identified as a means of attaining complete monitoring of fishing activity. A study on fully documented fisheries (FDFs) concluded that REM is 'proving to be an adequate tool.'¹⁴⁸ Although, its 'sustained use in European fisheries is nevertheless uncertain, both because the applicability of REM is more difficult for large fleets of small vessels, and because of the ethical questions that the system raises.'¹⁴⁹ However, given the fishing industry's persistent non-compliance, stricter surveillance is justified.

Introducing the discard ban is seen as 'a driving force for developing more selective gears and methods.'¹⁵⁰ It follows the shift towards imposing responsibility onto the

67(1-2) *Marine Pollution Bulletin* 66-74 at 68.

¹⁴⁰ Eliassen, S., et al., 'Decentralising: The implementation of regionalisation and co-management under the post-2013 Common Fisheries Policy', (2015) 62 *Marine Policy* 224-232 at 229.

¹⁴¹ *Ibid* 230.

¹⁴² Salomon, 'Masterstroke or paper tiger', 82.

¹⁴³ Wakefield, *Reforming the Common Fisheries Policy*, 72.

¹⁴⁴ Catchpole, T., et al., 'The challenges of the landing obligation in EU fisheries', (2017) 82 *Marine Policy* 76-86 at 76.

¹⁴⁵ 2013 Fisheries Regulation Article 15(1).

¹⁴⁶ Wakefield, *Reforming the Common Fisheries Policy*, 74.

¹⁴⁷ Salomon, M., et al., 'Masterstroke or paper tiger: the reform of the EU's Common Fisheries Policy', (2014) 47 *Marine Policy* 76-84 at 79

¹⁴⁸ Ulrich, C., et al., 'Discarding of cod in the Danish Fully Documented Fisheries trials', (2015) 72(6) *ICES Journal of Marine Science* 1848-1860 at 1858.

¹⁴⁹ *Ibid* 1858.

¹⁵⁰ Catchpole, 'The challenges of the landing obligation in EU fisheries', 83.

appropriator as fishermen now have an incentive to become more selective in extraction practices to minimise unwanted catch because the landing obligation dictates that landed catches will (where applicable) be counted against quota.¹⁵¹ Logistical problems for purse seiners and bottom trawlers due to limited hold space are identified as an obstacle for the landing obligation.¹⁵² Nonetheless, the discard ban is one of the CFP's most important measures to date and, 'despite some institutional inertia, the national efforts and the international coordination have allowed significant progress to be made.'¹⁵³ Recent research gives reason to be optimistic about the discard ban;¹⁵⁴ in 2017, the Commission reported that the obligation was being widely applied to TACs across EU fisheries but also appreciated that the process is ongoing, 'requiring concerted efforts from industry and administrations.

3 Brexit: The Fisheries Question

Leaving the EU is set to be a 'defining moment in the constitutional politics of the UK.'¹⁵⁵ From the perspective of the UK's fishing industry the Factortame outcome was a cause for complaint because it produced an outcome that was incoherent, and had left unresolved tension between fundamental Community principles. Brexit creates an opportunity to reinvent the UK's fishing industry.

In 2017, the UK government announced its plan for a Fisheries Bill that would 'enable the UK to control access to its waters and set UK fishing quotas once it has left the EU.'¹⁵⁶ A profound challenge awaits; achievement would necessarily entail that the UK government would succeed where European legislators have failed. The severity of the situation has created a greater awareness of the importance of a healthy marine environment and the impact of man's activity. For example, documentaries such as 'The End of the Line' and chef Hugh Fearnley-Whittingstall's (pre-2013 Fisheries Regulation) campaign to get the EU to ban discards effectively highlighted the

¹⁵¹ 2013 Fisheries Regulation Article 15(1)

¹⁵² Maynou, F., et al., 'Fishers' perceptions of the European Union discards ban: Perspective from south European Fisheries', (2018) 89 *Marine Policy* 147-153 at 151.

¹⁵³ Uhlmann, S.S., et al., 'Discarded fish in European waters: General patterns and contrasts', (2014) 71(5) *ICES Journal of Marine Science* 1235-1245 at 244.

¹⁵⁴ Catchpole, T., et al., 'How to deal with the EU landing obligation: Lessons from an English discard ban sea trial', (2018) 75(1) *ICES Journal of Marine Science* 270-278 at 275.

¹⁵⁵ Gordon, M., 'Brexit: a challenge for the constitution, of the constitution?' (2016) 12(3) *European Constitutional Law Review* 409-444 at 409.

¹⁵⁶ The Queen's Speech 21 June 2017.

destructive practices of the fishing industry.¹⁵⁷ The referendum campaign significantly raised the profile of fisheries, 'which was widely seen as a policy area where there was much to gain and little to lose from leaving the EU'.¹⁵⁸ The House of Lords European Union Committee (HLEUC) acknowledges that withdrawal from the CFP presents the UK with the opportunity to develop a tailor-made fisheries management regime. However, there is also recognition that the UK and the EU will part ways just as the CFP has started to display signs of improvement due to its recent reform.¹⁵⁹

The finer details are virtually impossible to envisage as there remains 'uncertainty as to when and how negotiations on the fisheries question will unfold, let alone their likely outcomes.'¹⁶⁰ Some form of interim measure will be required 'to ensure there is an adequate regulatory framework going forward.'¹⁶¹ Despite the end-result being unknown, a number of broad implications that Brexit could have on fisheries management in the UK have been identified; control over a greater area of sea, a renegotiation of quotas allocated to the UK, power to walk away from negotiations, the degree to which exclusion of non-UK vessels would be possible, international cooperation on setting quotas and UK influence on management of stocks shared with the EU and, a UK fisheries policy/management system.¹⁶²

Control Over a Greater Area of Sea

Individual EEZs of Member States are treated as a collective EU zone in order to 'harmonise competition between fishers'.¹⁶³ The 0-6 nautical mile zone is reserved for domestic fishing whereas States with historic fishing rights are permitted to fish in the 6-12 nautical mile zone of some other States. The UK identified Norway and Iceland as both having control over fishing in their own EEZs. A seamless assumption of control of the EEZ after Brexit is unlikely; the coastal State, in granting other States access to its EEZ, is obliged to take into account 'the need to minimize economic

¹⁵⁷ Bresnihan, P., *Transforming the Fisheries: Neoliberalism, Nature, and the Commons* (2016) at 77.

¹⁵⁸ *Brexit: Fisheries 8th Report of Session 2016-2017*, House of Lords European Union Committee (2016) at para.1, p.5.

¹⁵⁹ *Ibid* 3.

¹⁶⁰ Phillipson, J., and Symes, D., "'A sea of troubles": Brexit and the fisheries question', (2018) 90 *Marine Policy* 168-173 at 168.

¹⁶¹ *Brexit: Written and Oral Evidence*, House of Lords Energy and Environment Sub-Committee (2016) at 47.

¹⁶² Hirst, D., *Brexit: What next for UK fisheries?* (2017) House of Commons Library Briefing Paper Number CBP7669 at 7.

¹⁶³ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.19, p.9.

dislocation in States whose nationals have habitually fished in the zone'.¹⁶⁴ Evidently then, control of the EEZ will by no means 'wipe the slate clean'.¹⁶⁵

Arguably, the UK government is mistaken in drawing a parallel between Norway and Iceland and the UK and the degree to which these States exert control over their respective EEZs. Neither are EU Member States, therefore their fisheries do not come under the jurisdiction of the CFP and their respective EEZs have never been considered part of the EU's waters. Consequently, Norway and Iceland's circumstances cannot be said to be wholly analogous to those now faced by the UK. Caution is needed in using Iceland's situation as a model for the UK.¹⁶⁶ Nevertheless, the consensus among witnesses consulted by the House of Lords EU Energy and Environment Sub-Committee (HLESC) was that 'upon withdrawing from the EU, the UK will assume control of the UK EEZ'.¹⁶⁷

Renegotiation of Quotas and Walking Away From Negotiations

Either the British government or the public body responsible for fisheries management will determine the TAC in UK waters post-Brexit.¹⁶⁸ Most fish stocks are shared with neighbouring States, therefore proper management of North Sea stocks requires 'some form of co-operative management regime between the EU, the UK and Norway'.¹⁶⁹ Uncertainty remains about whether Brexit will grant the UK greater bargaining power to renegotiate its allocated catch quota and successful negotiation will inevitably require both the UK and the EU to be willing to reach agreement.¹⁷⁰ Yet there is a reluctance to depart from established practices in the EU due to the risk of a 'knock-on effect'.¹⁷¹ Recent improvements to fish-stocks may also make the EU extra-resilient to granting concessions to the UK in fear of disturbing the delicate situation.

Persuading the EU to rearrange quota allocations is unlikely to succeed because of

¹⁶⁴ 1982 *United Nations Convention on the Law of the Sea* Part V Exclusive Economic Zone Article 62(3)

¹⁶⁵ Phillipson, "A sea of troubles", 69.

¹⁶⁶ *Brexit: Fisheries Written and Oral Evidence*, 61.

¹⁶⁷ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.29 p.13.

¹⁶⁸ *Brexit: Fisheries Written and Oral Evidence*, 55.

¹⁶⁹ *Ibid* 47.

¹⁷⁰ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.124 at p.37.

¹⁷¹ *Brexit: Fisheries Written and Oral Evidence*, 52.

the 'historic reluctance of Member States to renegotiate the relative stability key.'¹⁷² Professor Churchill concurred, calling it a 'mammoth task'.¹⁷³ Although the UK has some bargaining power at its disposal; for example, catch statistics 'suggest that EU vessels have a clear interest in preserving access to the UK EEZ.'¹⁷⁴ Some have suggested the 'lever' method of negotiating premised on the idea that 'by withholding access to fishing in the UK EEZ, the UK can get better quota allocations.'¹⁷⁵ But adversarial tactics are likely to do more harm than good as they will leave issues unresolved thereby generating more confusion in a discussion already rife with uncertainty.

Exclusion of Non-UK Vessels

This issue is likely to be one of the most 'complex and contentious'¹⁷⁶ areas faced by negotiators. Excluding EU vessels from the EEZ is unfeasible practically speaking because it would 'trigger reciprocal exclusion of UK vessels from the EU fishing zone.'¹⁷⁷ Fishing for Leave argue that it is worth the sacrifice; as UK waters have the 'lion's share of resources, reciprocal access...is a one way street massively to our [the UK's] detriment.'¹⁷⁸ However, the EU may prove uncooperative in other areas of the Brexit negotiations should the UK prove to be too antagonistic. After Brexit, EU vessels with a right of access to the UK EEZ will then become subject to UK-formulated regulation.¹⁷⁹ Withdrawal from the 1964 London Convention has been identified as a means of extinguishing historical fishing rights in UK waters.¹⁸⁰ Whilst the UK is entitled to revoke the Convention, doing so could give rise to 'diplomatic consequences in bilateral relations over and above those which will be a part of the Brexit discussions.'¹⁸¹ Professor Churchill believes that the Convention was subsumed by the CFP and therefore the UK would not be bound by the obligation to observe historic rights in the 6-12 nautical mile zone.¹⁸² In contrast, Lord Gardiner appears to state that

¹⁷² *Brexit: Fisheries 8th Report of Session 2016-2017*, para.137 p.39.

¹⁷³ *Brexit: Fisheries Written and Oral Evidence*, 52.

¹⁷⁴ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.135 p.39

¹⁷⁵ *Ibid.* at para.131 p.38

¹⁷⁶ Phillipson, "A sea of troubles", 173.

¹⁷⁷ *Ibid.* 170.

¹⁷⁸ *Brexit: Fisheries Written and Oral Evidence*, 111.

¹⁷⁹ Phillipson, "A sea of troubles", 170.

¹⁸⁰ Perraudin, F., 'UK to 'take back control' of waters after exiting fisheries convention', *The Guardian*, 2 July 2017.

¹⁸¹ *Brexit: Fisheries Written and Oral Evidence*, 15-16.

¹⁸² *Ibid.* 58.

the Convention will re-emerge after Brexit.¹⁸³ Yet if the UK did remain bound, the Convention contains a clause stipulating that 'after the expiration of a period of twenty years from the initial entry into force...any Contracting Party may denounce the Convention by giving two years notice in writing to [the UK government].'¹⁸⁴ This view is also supported by Professor Barnes, who stated that 'there would be no claims to historic rights in the UK EEZ which could be sustained going forward' suggesting that after Brexit, the Convention may resurface, but nevertheless maintained that the UK can 'legitimately withdraw from the Convention.'¹⁸⁵

The UK will also have to deal with 'flag-vessels' – 'UK registered vessels mainly crewed by UK nationals and landing most of their catches into UK ports but owned by non-UK fishing interests.'¹⁸⁶ A result of the UK's chosen quota-management approach, 'resolving this anomaly could prove financially very costly.'¹⁸⁷ Similarly, restricting access to the UK's EEZ would not 'automatically apply to quota-hopping vessels.'¹⁸⁸ The practice caused a substantial controversy amongst UK fishermen and the *Factortame* litigation illustrates how the UK was denied the ability to protect its allocated quota. Yet quota-hopping is made possible because of the freedom of establishment principle and is not attributable to the CFP. Professor Churchill asserts that quota-hopping could be stopped if it is excluded from the fishing industry.¹⁸⁹ Alternatively, the government could 'seek to ensure that domestic quotas deliver benefits to the UK, regardless of quota-hopping, by strengthening the 'economic link'.¹⁹⁰ A definite plan remains undeveloped, although complete exclusion of foreign vessels from the EEZ at the expense of cooperating with Norway and the EU would likely be a 'hollow victory'¹⁹¹ because it would likely result in overfishing.

Cooperation with the EU and Other States

Uncertainty surrounds this area because Brexit terms are not yet set in stone. A 'soft'

¹⁸³ *Fisheries: Written Question – HL5592*, Parliament – Publications and Records
<https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2017-02-23/HL5592>

¹⁸⁴ *1964 London Fisheries Convention* Article 15.

¹⁸⁵ *Brexit: Fisheries Written and Oral Evidence*, 58, 59.

¹⁸⁶ Phillipson, "A sea of troubles", 170.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.47 p.17.

¹⁸⁹ *Brexit: Fisheries Written and Oral Evidence*, 60.

¹⁹⁰ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.49 p.18.

¹⁹¹ *Brexit: Fisheries Written and Oral Evidence*, 59.

Brexit is 'more likely to be conducive to the building of wider, informal cooperative structures' whereas a 'hard' Brexit will make 'future cooperation much more difficult.'¹⁹² UNCLOS contains provisions to facilitate cooperate between States and the United Nations Fishing Agreement¹⁹³ (UNFSA – which the UK is a party to) was created to complement UNCLOS measures on straddling and highly migratory fish-stocks. The UK government has expressed a commitment to join the relevant Regional Fisheries Management Organisations (RFMOs) post-Brexit.¹⁹⁴ Ultimately, the UK's geographical location entails that some degree of cooperative management of shared fish-stocks is inevitable; the need for such collaboration will be 'amplified by the presence of two jurisdictions sharing the same stocks'.¹⁹⁵ A trilateral agreement with Norway and the EU will probably be established¹⁹⁶ to coordinate the setting of TACs, allocation of quotas and platform for cooperation post-Brexit. Promisingly, the government prioritised sustainability and hopes to avoid a unilateral approach.¹⁹⁷

4 A UK Fisheries Policy?

Brexit creates a 'completely new situation for UK fisheries'¹⁹⁸ therefore it is likely that the new policy will endure a shaky start. Going forward, it is recommended that positive elements of the 2013 Fisheries Regulation should be embedded into the UKFP to facilitate the development of a harmonious dynamic between the UK and the EU. The Marine Conservation Society argues that MSY must 'remain an integral part of any fisheries management in the UK'.¹⁹⁹ The Department for Environment, Food and Rural Affairs (DEFRA) is likely to be responsible for the UK Fisheries Policy (UKFP) but has been 'subject to significant cuts in recent years, giving rise to concern that it will not be able to manage this considerable task.'²⁰⁰ Accordingly, UKIP has suggested the creation of a designated Fisheries Ministry to oversee the task.²⁰¹ The Norwegian

¹⁹² Ibid. at p.172

¹⁹³ Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks [1995]

¹⁹⁴ *Government response to House of Lords EU Energy and Environment Sub-Committee Report into the future of fisheries in the light of the vote to leave the EU*, (2017) at p.9

¹⁹⁵ Phillipson, "A sea of troubles", 173.

¹⁹⁶ Ibid. at 172.

¹⁹⁷ *Government response to House of Lords EU Energy and Environment Sub-Committee*, 6.

¹⁹⁸ Phillipson, "A sea of troubles", 172.

¹⁹⁹ *Brexit: Fisheries Written and Oral Evidence*, 131.

²⁰⁰ *Brexit: Fisheries 8th Report of Session 2016-2017*, para.76 p.25.

²⁰¹ *Brexit: Fisheries Written and Oral Evidence*, 161.

and Icelandic fisheries regimes are cited as 'particularly impressive'.²⁰² Norway places great emphasis on 'controlling not only what happens after the vessel has landed but also controlling activity at sea.'²⁰³ Yet such stringent enforcement will be hard to implement considering that there are only three Royal Navy vessels dedicated to inshore fisheries protection. Admiral Lord West described the UK's plan to exert control over fishing waters with such paltry resources as 'amazingly complacent'.²⁰⁴ Such statistics provide strong evidence that the UKFP will not be adequately enforced due to insufficient funds and resources.

Conclusion

The hallmark of the UK's fisheries post-Brexit is uncertainty. Whilst the outcome remains unknown, future governance will require 'a coming together of UK and EU management approaches through a shared vision, common strategy and compatible – though not necessarily identical – regulatory systems'.²⁰⁵ Considering that fisheries are relatively economically insignificant there are 'widespread concerns that fisheries will be pushed aside in the negotiations'.²⁰⁶ However, the government affirmed that fisheries would not be marginalised.²⁰⁷ History suggests a real danger that fisheries will be sidelined and statements such as 'taking back control'²⁰⁸ will be revealed to have been political posturing. The government mostly agreed²⁰⁹ with the HLESC findings, although the question remains whether this will translate into effective policy in a sector which has so often been overlooked. Yet despite the overwhelming challenges ahead, the UK has an opportunity to capitalise on the emerging worldwide concern for the marine environment and expand on the gradual progress of the 2013 CFP. Negotiating is only the first stage of developing a UKFP but may prove decisive - a critical time edges nearer for UK fisheries.

²⁰² *Brexit: Fisheries 8th Report of Session 2016-2017*, para.80 p.26.

²⁰³ *Brexit: Fisheries Written and Oral Evidence*, 70.

²⁰⁴ Carrington, D., 'Admiral calls plan to police post-Brexit fishing waters 'amazingly complacent'', *The Guardian*, 3 July 2017

²⁰⁵ Phillipson, "'A sea of troubles"', 173.

²⁰⁶ *Brexit: Fisheries 8th Report of Session 2016-2017* para.8 p.6.

²⁰⁷ *Government response to House of Lords EU Energy and Environment Sub-Committee Report into the future of fisheries in the light of the vote to leave the EU*, (2017) at p.8

²⁰⁸ Macdonell, H., 'We will take back control of fisheries, says Hammond', *The Times*, March 12 2018

²⁰⁹ *Government response to House of Lords EU Energy and Environment Sub-Committee Report into the future of fisheries in the light of the vote to leave the EU*, (2017)